UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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STUDENTS FOR FAIR ADMISSIONS, INC., Plaintiff,
vs.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE, et al, Defendants.
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CIVIL ACTION
No. 14-14176-ADB

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE
STATUS CONFERENCE

A P P E A R A N C E S

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Courtroom No. 16
John J. Moakley Courthouse
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July 21, 2015
2:00 p.m.

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P R O C E E D I N G S

THE CLERK: All rise. Court is in session. Please be seated.

This is civil action 14-14176, *Students for Fair Admissions, Inc. versus President and Fellows of Harvard*.

Will counsel identify themselves for the record.

MR. SANFORD: Good afternoon, Your Honor. Paul Sanford on behalf of the plaintiff Students for Fair Admissions.

MR. STRAWBRIDGE: Patrick Strawbridge from Consovoy McCarthy Park, also on behalf of Students for Fair Admissions.

MR. CONSOVOY: Will Consovoy for Students for Fair Admissions, Your Honor.

MS. ELLSWORTH: Good afternoon, Your Honor. Felicia Ellsworth for Harvard College.

MR. WAXMAN: Seth Waxman, also for Harvard College.

MS. GERSHENGORN: Ara Gershengorn, good afternoon, Your Honor, for Harvard College.

THE COURT: Thank you all. We are in this little courtroom today. I actually kind of like it. It feels a little more intimate to me.

So I know we set this up as sort of a routine status to kind of keep this on track. And I want to sort of

rule on what I am prepared to rule on today and then have some discussion about sort of what is next.

So Harvard has filed a motion to file under seal an unredacted proposed reply memo of law and supporting material in support of the Motion to Stay which I have read and also a Motion for Leave to File a Reply Memorandum in Support of a Motion to Stay which I also have read. Both those motions appear to be unopposed and, in any case, they are both granted.

Then I also have sort of two sets of documents here. I have Harvard's Motion to Stay, SFFA's Opposition to the Motion to Stay, now Harvard's reply memo which I guess under the rule you have to refile but I do have a copy in front of me, and then Plaintiff's Motion to Compel Production which I don't believe has been responded to yet; is that right?

Okay. So, and on top of that, issues one and two, on top of that, as you all are no doubt aware, I ruled on the motion to intervene and the intervenors have filed a Notice of Appeal in that so I sort of feel like those are the three general topics.

I have skimmed Plaintiff's Motion to Compel Production and I am going to put that aside until Harvard has a chance to respond to it.

If anybody does have anything they want to say on

that today, that is fine but I really haven't thought hard about that motion or spent any time reading it but I have received it.

My preliminary question on the issue of the stay -- I know there is a lot of appellate specialists back there and I am not one -- do you all have thoughts on whether or not I lose jurisdiction while the motion to intervene is pending, the appeal on the motion to intervene is pending?

I have tried to do some research on it and the answer seems very unclear to me. We will do some more on that but I thought rather than spend too much on it, I know you are the biggest, a big appellate specialist crew out there and I thought maybe one of you might know the answer. I actually had lunch with a First Circuit Judge and I said just --

(Laughter.)

THE COURT: -- an interlocutory appeal he is, like, I don't know. So I am going to throw it back out to you guys. Do you have any thoughts on about what happens to my jurisdiction?

MR. CONSOVOY: This is a guess, Your Honor, so please don't hold me to it. I believe their appeal is under the Collateral Order Doctrine so they have an, that's how they're getting up on appeal, so I believe you still have jurisdiction over the remainder of the case while they are

appealing, if that's the question you're asking. But that's based on no research.

THE COURT: Okay.

MR. WAXMAN: I'll offer you my tentative off-the-cuff view and you can hold me to it for whatever it is worth.

I think that's correct, I think that you don't lose jurisdiction. I would be quite surprised if you did because in *Grutter* as I recall there was a denial of a motion to intervene and the case went forward during the pendency of the appeal on the denial of a motion to intervene. And the Sixth Circuit held that intervention, that the intervenors were entitled to participate, they just joined and, you know, I don't know, restarted discovery but augmented discovery. So I think, as far as I know, you can continue. We can all continue to talk here today.

THE COURT: And I understand that everyone in this room would probably like it to continue in some form or another, just, we will just ignore those people over there.

Has any sort of scheduling order been set in that? From the intervenors?

MR. CONSOVOY: Not to my knowledge. I saw the notice of appeal but I have not seen a scheduling order.

THE COURT: Okay. So on the one hand we have the intervenors and one can obviously make an argument that

we should go forward in the face of the motion to intervene and the appeal and you can also make an argument that given that what they want to do is participate fulsomely in discovery that there are some counterarguments that perhaps it should be stayed.

And then on top of that we have Harvard's motion to stay and whatever the *Fisher* overlay is, I do feel like the gravitational forces of the universe are sort of pushing me towards a stay on this. That being said, and this is not meant to be any sort of ruling on the merits because I haven't delved into it deeply enough today, and I am going to give you all an opportunity to argue anything that you want beyond what is in the briefs today but I really don't want to stay the case in its entirety.

It appears to me, and, again, I will be interested in your opinions on this, but whichever way *Fisher II* goes, and I am not totally sure why the Supreme Court is rehearing it, I am not sure exactly what their interest is, but it seems unlikely to me that it will completely moot this case.

So if there are things that we can do during the pendency of *Fisher* and the pendency of this appeal, I would like to do some of those things, if there are those things that we can identify will need to be done in any case.

And I say that understanding that Harvard wants a complete stay and that SFFA wants no stay at all; but I am

thinking about sort of a middle ground where we get some of the fundamentals of discovery done and then, so there is not too much replication depending on how *Fisher* works out, how the motion to intervene works out.

So, again, I am not going to rule on the motion today. I just got Harvard's brief. I have read SFFA's opposition but not carefully enough. I thought we could use this as sort of a hearing, quasi hearing opportunity on it.

Mr. Consovoy, you look like you want to speak. You can go first.

MR. CONSOVOY: Yes. Obviously our papers, you know, you're right, Your Honor, we definitely would like the whole case to go forward. I think, I hope we can get agreement today on these two basic propositions and I think we will debate the rest.

But Count I is a claim of invidious discrimination against Asian Americans. I don't suspect Harvard will leave that issue before the Supreme Court. That has nothing to do with an interest in critical mass or anything like that. It is an old fashioned, you know, under *Yick Wo* and the cases that are over a century old, saying you cannot intentionally discriminate against any racial group in this setting, one.

Two, Count II of the Complaint has to do with racial balancing, that you are balancing the class in some of a, you know, a quota system. I hope and suspect that

Harvard will also agree that that is, that *Fisher II* will never make that permissible. That has been banned for a long time, decades. Going back to *Bakke*, it was reiterated, that's been a, you know, against the rules in *Grutter* and in *Fisher I* and Texas is not suggesting that they're engaging in racial balancing.

Those are the two sort of premier claims and I think they would get most of the discovery done. And I don't think there is any allegation that the Supreme Court's decision no matter what it is doing will shed any more light on that than we have now.

THE COURT: Mr. Waxman or Ms. Ellsworth, do you want to respond?

MR. WAXMAN: Well, I think, I take Your Honor's point that it may well be that what the Supreme Court decides in *Fisher II* is anybody's guess, what the Supreme Court will decide in *Fisher II*.

As we pointed out in our reply, and I won't reiterate it here, the face of the petition for certiorari and the public statements of Ms. Fisher's lawyers suggest that what the Supreme Court is being asked to do is to substantially affect the way in which the current rules under which race is taken into account. I mean, if all *Fisher II*, if the only complaint in *Fisher II* was that there was a footfall in the application of an agreed upon

standard, it's very, very unlikely that the Supreme Court would be taking the case again. That's not what the Supreme Court does. And it's not what it's being asked to do and so we don't really know.

And since, I would say that on the issue of whether it would render this lawsuit moot or not, No. one, I think that's not the issue and I'll come back to that; but, No. two, it may, in a sense, that there is no retrospective relief being requested here, this is, they are seeking an injunction to stop Harvard from conducting its holistic admissions process the way that it currently has been doing.

And in the event that the Supreme Court were to do any one of the things that their cert petition asks the Court to do, including determining that what they call "qualitative diversity" as opposed to "quantitative diversity" is inappropriate, or that the consideration of race should be limited to, quote, the last few spaces in a class, or that race can be taken into account only for reasons that were expressed by the University at the time it began doing so, all of which the Supreme Court is being asked to consider.

Harvard, independent of this lawsuit, Harvard would have to reconsider whether or not it can continue to conduct its admissions program the way it has been and has been long since *Bakke* was decided. That would, in fact, render the

Complaint in this case moot. Harvard would consider whether it had to change. If it did change, they could bring a claim saying we haven't changed it enough but there is a very real prospect that if the Supreme Court does everything that is being asked of it, the University will have to consider on a going forward basis how it continues to operate.

We believe that our program satisfies *Fisher I* and *Grutter*, *Gratz* and *Bakke* but so did the University of Texas and so did the Fifth Circuit. And we think that the University of Texas, in fact, has complied. The Supreme Court has decided to consider the question whether they have and what guidelines ought to apply. And that has bearing I think in two regards, in addition to the fact that it may, in fact, moot the prospective relief challenge here.

One is that it is going to inevitably affect the scope and the magnitude of discovery in this case. Now, there is a suggestion that, well, Count I says that we're intentionally discriminating against Asian Americans. Count II says we're engaging in racial balancing.

I don't think that the plaintiffs are prepared to dismiss Count III and Count IV and, frankly, all of the discovery in this case, I don't think it can be segregated. We're asking about -- they're asking to examine the same documents, examine the same witnesses, respond to all the

same contention interrogatories. We're either going to go forward with the discovery or we're not. And no one can say the extent to which the scope of permissible discovery will be affected.

Now, their position is, well, we're not going to ask for any more discovery no matter what *Fisher* decides and that's because, and, you know, we'll get into this when you finally adjudicate the Motion to Compel and see what we are prepared to produce. They're asking for everything. And the notion that there is going to be nothing left more for us to ask for, you just give us everything and then we will decide in light of *Fisher* what subset of that we need.

A, it is inappropriate to place on Harvard, a nonprofit institution, discovery that is going to be intrusive, burdensome and enormously expensive. The types of discovery that they're trying to get in this case, and that if we go to the merits of the case they will be, if we -- on some subset of which they would be entitled to once we understand what the constitutional standard is, has enormous student privacy concerns, enterprise concerns for a private educational university and how it goes about making decisions.

And I think the balance in evaluating where the balance lies in terms of a stay or not stay, I think it would be a mistake to think that you can segregate discovery

as to certain claims of the Complaint and not others. And it also would be a mistake not to consider the fact that the request for a stay here is a consequence of a very considered decision by the leadership, the leadership of SFFA to litigate the issue of the permissible use of race in university admissions in three different courts at the same time. And in light of all the circumstances, not to mention the fact that the First Circuit may, in fact, conclude that the intervenors indeed have a right to participate, and what they want to participate in is discovery, that on balance we think the Court should exercise its discretion and, in fact, stay discovery in this case until the Supreme Court explains what the relevance is.

THE COURT: So -- I am going to give you another chance to talk, Mr. Consovoy, you can sit -- he was just about to stand. I am just saving the wear and tear on his knees for a second.

I am not contemplating segregating discovery by count. And I don't, I didn't actually understand that that is what Mr. Consovoy was asking for. I think what you were saying is that there are two counts that are going to be unaffected and we may as well do discovery since those two counts will survive. But, in any event, if I have misunderstood you, I am not going to segregate discovery by count.

And I, you know, I understand that we have the intervenors and we have *Fisher II* and those two things have the capability of changing the landscape significantly over the next few months between the two of them. I have not decided what I am going to do on the motion. I need to look at it much more closely than I have but perhaps in an overabundance of practicality, what I am wondering is if there is, once the intervenors are resolved and once *Fisher II* is resolved, I would like to have this case in a position to move expeditiously forward. And I am wondering if there are things that we can do now to position ourselves for that.

And I may be naive about this and I may not understand Harvard's admissions process but what I was sort of thinking was that SFFA is going to need to look at some of these applications, look at some of the basic discovery, figure out how they're going to load the information into a computer and how they are going to do whatever analytics they're going to do on it and that maybe it made sense to give them some, you know, smaller sample of applications. They can get their system and their processes in place so that when it does become more clear what they're going to get and what they're not going to get, that they can just load information rather than spend the time trying to figure out how to handle that information.

I may be completely off base about that but that is what I was sort of thinking, just some way to get processes in place so when all these issues resolve themselves we can move forward without wasting any more time.

It was your turn, go ahead.

MR. CONSOVOY: Direct, responding to your question directly, we would have to talk to our experts but I suspect our processes are ready to go. We are waiting on some discovery. We haven't had any yet. This case has been pending for a long time now. To have no documents produced is I would confess frustrating.

I think some of the concerns we raised at the initial scheduling conference have borne out, how long it took to get a protective order in place, how long it took to negotiate electronic discovery.

We represent something like over 16,000 students now. 64 Asian-American organizations filed a Complaint with the Department of Education. That Complaint was dismissed because the Department of Education told them that this case is proceeding so, therefore, they will not review their Complaint.

And now Harvard comes here to say stop this case from proceeding, now that the Complaint is dismissed, and then I gather Harvard is going to tell the Supreme Court please don't do anything to change what the University of

Texas did but if you do, to Your Honor, please look at footnote one of our stay paper where we say even if we lose terribly in *Fisher II*, we're going to argue that it really has an affect on us because we're a private institution that's governed by Title VI and not by the Fourteenth Amendment. So if there is a concern of litigation strategy here, I think it's Harvard's and not ours.

Second, I wrote the *Fisher* petition. I would direct Your Honor to -- I think it really solves these issues more than we can debating it -- the brief in opposition submitted by the University of Texas. They said everything that Mr. Waxman said. Well, surely --

THE COURT: Probably not as well.

(Laughter.)

MR. CONSOVOY: Well, no one could. But it is a footfall case. They're just asking for review. And, look, they have this Harvard case going. If you really want to get to the big issues, wait for that one.

In response we said no, you're right, you're right, this is about correcting error from the Fifth Circuit and you don't normally do that but this was a pretty big error and this is a pretty big case.

And, two, this is a big issue irrespective of what happened with the larger issues. This case is about whether strict scrutiny was correctly applied. I think if you read

those papers you will see that almost everything Mr. Waxman said about *Fisher* actually is inaccurate, that we're not challenging them to limit them to *Bakke* there. We're saying that their arguments don't stand up to their own reasons. And I won't go on about it more than that.

I agree with Your Honor that segregating discovery is going to be difficult here. I think my point was, and I think you definitely grasped it, was -- and I didn't hear Mr. Waxman say differently -- Counts I and II are against the law now and they will be against the law after *Fisher*. They are the lead count in the Complaint. They will be unaffected by the case.

Harvard bears the burden of saying why a stay will do something here. And their argument seems to be we might lose *Fisher* so badly that we might abandon the whole thing. That's an unusual reason for someone to grant a stay, to seek a stay, particularly when they say that if we lose, we're going to argue that *Fisher* had no application to us.

I really do think the case should go forward. It will eliminate the concern about destruction of evidence, witnesses, God forbid, passing away or moving out of the jurisdiction. We will add another admission cycle to this process. Every year 37,000 more students go through this process.

The reason why this case is a big deal is because

this is a major Civil Rights action and there is an interest in justice in cases like that going forward. It would take a really big reason on Harvard's part to stay it. And I understand there are convenience issues. And I agree, you know, could *Fisher* dictate certain changes to the legal standard of summary judgment briefing, maybe, but we're going to be done with discovery before we ever get to that. There really, there just really isn't a basis for a stay.

And my last point is on the intervenors. They haven't sought a stay of the discovery pending appeal yet. They could. I think that would be something everyone would want to look at if they did. And if I recall their papers, they were mostly interested in expert discovery. Their appeal will likely be resolved well in advance of expert discovery. They certainly haven't suggested they're going to be producing facts. And they certainly have said to us I believe in their papers, I apologize if I'm wrong, if it was in an email exchange, but that they would likely let Harvard take the lead on propounding discovery on us. They're not going to add fact discovery. So, if anything, we could think about this when we get to expert discovery and see where the intervenors are but I wouldn't let the tail wag the dog on a stay here. This is a big, big deal.

THE COURT: So, again, I haven't read the papers thoroughly enough, especially since I just got some

of them today, to rule on this; but is there a smaller subset of information that were I inclined to give some sort of limited stay in this, is there some smaller subset of information that would, "satisfy you" would be an overstatement but that would help advance the case?

MR. CONSOVOY: So I think if you look at the Motion to Compel, the sample of application files are a major centerpiece and will take a large part of our work. I think the names, and I don't want to prejudice Your Honor's review of the papers, but Harvard has said we've asked for the names of alumni interviewers who they concede are third parties in this case and who we would like to investigate, interview some and maybe depose some but, you know, third-party discovery which would have no real burden on Harvard, you know. They won't even give us the names.

So I would say could we at least, and maybe if Your Honor, you know, over opposition grants a partial stay, we could perhaps submit something in writing that could more clearly detail the kinds of things that would be helpful but getting files would be a huge step forward. Getting the names of the alumni interviewers would be a second huge step forward. And getting just basic materials that we can start reviewing, the training materials, the instructions for readers, their policies on affirmative action and why they use it, stuff that they have and, you know, we're six months

in and, yeah, discovery, you know, of some custodians in the Admissions Office, just the basics. As you put it, sort of the ground floor of building the case. I mean, at a minimum we would ask for that; but, again, I don't want, you know, we would oppose any stay of course.

THE COURT: I understand.

Mr. Waxman, in terms of -- I take the application files and put them in a separate category. And I think there is going to need to be a more fulsome discussion about those applications and how many they get. They have, you have asked for an enormous number of things and I take it it is going to be a lot of work for Harvard to redact those sufficiently to give those to you.

But he might be making a reasonable proposal which is that we start with some things that don't really infringe on student privacy like the alumni interviewers and the training manuals and all that sort of thing.

What is your view on starting with those things?

MR. WAXMAN: I am hesitating only because I am wondering whether my partner Ms. Ellsworth should speak because she's been negotiating the discovery issues. On the other hand -- I'm always reluctant to pass up the opportunity to stand up but --

(Laughter.)

THE COURT: Well, that being said, I am always

delighted to have a woman stand up and speak in here. It doesn't happen that often.

(Laughter.)

MR. WAXMAN: Well, that's easy.

MS. ELLSWORTH: With that said. So in terms of what Mr. Consovoy has outlined as the kind of limited baseline of discovery, I mean, I think as Your Honor has recognized, there is some disagreement here about what that, where that baseline should begin and end.

Certainly things like policies and training manuals we could consider. I don't hear Mr. Consovoy asking for the files right now which is, of course, you know, both the subject of a dispute here as well as one of the major privacy interests.

We also have -- and this will be in our opposition motion -- we have agreed to provide to SFFA the admissions database and that contains we think, and, again, you will see this in our papers, but we think most, if not all, of what they purport to need from this huge number of files that they're requesting so, you know, there is sort of information that we see in the sense of the fields that are available in the database that we consider being, producing now and in the event of a limited stay, depending on how Your Honor rules on this.

There are sort of, I think there is a way that we

could make some progress without handling and grappling with some of these privacy issues that are so important to Harvard and also have, you know, major implications for our students and applicants and also the need for other considerations.

I would like to just make a quick point on the status of discovery that Mr. Consovoy has raised. It certainly is not the case that discovery is not ongoing. It's true that documents have not yet been produced but there have been RP's and interrogatories propounded and responded to on time by Harvard. They noticed the deposition of Director McGrath who is the Director of Admissions and that deposition is scheduled right around the date that was requested. It went forward. There was no objection so it is not, it is not the case that discovery is not going forward. It is the case the documents have not yet been produced but we certainly are collecting and will be prepared to produce those expeditiously in the event that Your Honor does order us to go forward.

But in terms of how we might limit the discovery, I think we could conceivably come to a baseline but I do think that what Mr. Consovoy was describing is closer to what we would consider the scope of appropriate discovery for the entire case would be as opposed to the more limited scope that I understand Your Honor to be suggesting.

You know, conceivably we could meet and confer with SFFA and come up with a proposal or at least competing proposals for how, what a limited stay might look like and what the parties would be willing to agree to. We certainly haven't thought precisely what we would be willing to propose at this point but we're happy to do that quickly if Your Honor would like.

THE COURT: All right. Well, let me do this. I, as I say, I am worried about the -- I am not worried about but we have the intervenors going to the Appellate Court. We have *Fisher II* out there.

That being said, I am very reluctant to stay the whole thing. I will read the briefs more carefully. I am talking about philosophically reluctant to stay the whole thing. I am sort of unencumbered by, you know, really a depth understanding of the law. And I will go back and read your briefs on that but I am not going to get to this, I have some teaching obligations for the rest of this week and won't be back in the office until next week.

So why don't you all take, say, a week and see if you can -- if I do come to the conclusion that some sort of limited stay is appropriate, understanding that I would like to in some way keep this going but without unnecessarily risking the duplication that may come as a result of the motion to intervene or *Fisher*, if you could come up with a

joint or competing proposals that if I choose the middle ground, I can get that into an order and get you guys back to work on this.

And if you can't, that is fine. If you just want me -- if you decide not to avail yourselves of the opportunity and you just want me to rule on the motion in its current form, I am happy to do that too. But if there are things that can be accomplished during this period, I would really like to try and get some of that done.

MR. SANFORD: If I may, Your Honor?

THE COURT: Absolutely.

MR. SANFORD: I understand the Court's reluctance to allow the case to go forward as a whole but I would suggest, Your Honor, that I cannot conceive of a partial stay in this case that would make any practical impact on discovery when I think it's virtually conceded by Harvard that Counts I and II will go forward on invidious discrimination against Asian Americans and Count II will go forward on racial balancing.

The only standard we need to meet support for discovery for those two counts is likelihood to lead to the discovery of admissible evidence period. It's a very simple standard for us to meet.

Those two counts alone, separate and apart from *Fisher II* and the intervenors who have taken an appeal, will

allow us to conduct the discovery that we have sought to conduct so far in this case. Unfortunately while there is some good news on discovery, as Ms. Ellsworth pointed out, which is we have taken the deposition of Ms. McGrath, the parties have exchanged some interrogatory answers and some document production responses, the reality is we are now three months removed from the initial scheduling conference in this case. The only documents Harvard has produced during that three-month period are about 7 to 9 pages of documents from the Admissions Office which Your Honor suggested they give to me because I would be entitled to know the names of the Admissions Office personnel, their job duties and their responsibilities.

In addition to those few pages which it took three weeks to receive we have also received some information on geographic areas or dockets for their alumni interviewers but that's it.

So the rate of production in this case so far from Harvard is equal to roughly one page per month for each month that this case has been pending. And now they come before the Court seeking a stay of the entire action based on *Fisher II* which when you get into *Fisher II* briefing and decision, you will see it really is the U.S. Supreme Court saying the Fifth Circuit apparently did not apply the standard which the Supreme Court had instructed them to

apply.

The discovery in this case is going to be broad sweeping. Now, Harvard came to you at the initial status conference and tried to portray this as plaintiff had the temerity to request copies of 145,000 application files. That was not the case. Plaintiff has never formally requested copies of every application file over the four-year period. In fact, what we had done was provide to Harvard a random sampling proposal of application files segregated by race for each of the four primary racial categories which constitute a minimum of 10 percent of the student body at Harvard. We requested four percent of the applications --

THE COURT: The number is still huge. I am looking for it but it is --

MR. SANFORD: It is 6400 files over a four-year admission cycle to root out invidious discrimination. It is a statistically significant sampling which is exactly what Harvard had offered to provide in the Joint Statement filed with this Court in writing prior to the initial scheduling conference that we had on April 30th.

Now what Harvard is doing, as we have pointed out in our motion -- I'm not trying to argue the motion on its merits -- is they would like to offer us one-tenth of one percent which is 160 files, 80 of which they cherrypick and

then say we can take the others. That is what we've been facing in discovery. They have not produced a single document in response to a document production request served months ago.

And it is unfortunate but I had pointed out to the Court at the initial scheduling conference my concerns that we might very well experience not only these types of delays but calculated decisions not to produce enough admissions files so they could attack any expert witness on the basis that it was not a statistically significant sample.

So at this stage, given the breadth of the two, the first two counts of the Complaint, I don't see any way that we could possibly fashion a partial stay with Harvard because the breadth of discovery is so broad and the discovery is so straightforward in our request with the four percent of the application files.

So with that, Your Honor, I would suggest we will meet, we will confer with Harvard to see if it is possible; but given the track record of what we've seen in negotiations so far, it took us over a month after the initial scheduling conference to agree on a protective order. Now we see Harvard wants to use the protective order as a shield and be over-inclusive on what they designate as confidential when in reality a simple Google Internet search will yield the same information, either from the *Harvard*

Gazette, the *Harvard Crimson*, the *New York Times*, or the *Boston Globe*.

So they've been extremely reluctant to produce anything in this case yet publicly available the information is out there.

So if we were to issue some kind of a partial stay of discovery, we'd want to seek to limit the perimeters of discovery, we wouldn't get a single document out of Harvard, which is really where we are at this point in response to our document production request.

So I would simply urge the Court please to take that into consideration when trying to fashion, if the Court is so inclined, some kind of a partial stay. The discovery in this case is very broad sweeping. And I would also submit that sampling four percent of the application files is a very narrow directly-targeted approach that included random sampling supported by an expert's affidavit and that is now going to open the door for Harvard to come back and reiterate what I had said at the initial scheduling conference which is they will try to claim there was enough of, you know, further confidentiality.

Thank you, Your Honor.

MS. ELLSWORTH: May I respond briefly?

THE COURT: Yes.

MS. ELLSWORTH: Thank you.

So I would just like to, I take on the suggestion that Harvard has been dragging its feet here. As I said, there has been a lot of discovery that has happened. Document productions will be ready to begin, you know, in the event that the Court doesn't stay all document production. It's not that we've been sitting around waiting for the Court to grant *Fisher II* in the hopes that we would never have to produce any documents. At the same time the documents that are being requested here, it's been referred to as broad sweeping and with great breadth. It is we think for overbroad, the requests that have been made, and particularly I would add, as Your Honor has commented, the number of applicant files, the 6400 is in the document requests proposed by plaintiff, simply a preliminary sample to lead to a much larger number which Your Honor had, at the initial scheduling conference had indicated a lack of interest in providing. And certainly Harvard does not agree that that is necessary or appropriate, from a pure burden standpoint, and also, of course, because of the very serious privacy concerns.

We are here without any documents to produce in part because Harvard in its responses which were filed well over a month ago made a proposal. We proposed 160 files, 80 that Harvard could choose and 80 that SFFA would be in a position to choose. That was our proposal for the files.

Instead of engaging in that proposal SFFA has filed a Motion to Compel. Now, that is their right and we will respond in due course but that has put the brakes on any ability to talk about any possible changes to that number. And, again, we will respond with our own argument as to why we think that number is appropriate and why we think that the plaintiff will be able to do everything that its expert contends that they need to do with the information that Harvard has already agreed to produce.

Our response --

THE COURT: Hold on a second.

Mr. Sanford, what are you thinking you are going to get out of the actual application files that you are not going to get out of the database they're offering to provide?

MR. SANFORD: Mr. Consovoy could address that directly, Your Honor, if he may?

MR. CONSOVOY: So the files are the heart of the case. And I think you'll see from our papers the answer to your question, Your Honor, that if you deny a statistically significant sample of files, what you're denying is the right to bring expert testimony. That's essentially what the ruling is. Because what the experts are going to do, Harvard -- I'm going to speak in generalities here because we're under a protective order and

there are things in the deposition that I can't get to in open court but Harvard claims that it's a holistic system. I think you heard Mr. Waxman say the word "holistic" more times than I can count. Certainly in their papers more times than any of us can count.

And the point of that, the point of their argument is that you can look at the numbers but the numbers don't tell you what is actually going on overall with the choice of applicants, that everyone is looked at as a whole person, that it's not just the numbers, that race is a contextual factor and that there is an evaluation that goes on. That's why they have training materials. If it was just the numbers that got someone into Harvard, they wouldn't have readers and they wouldn't have reader training materials because they're trained to read these applications as a whole.

The fundamental question here is do the scores add up to their reasons which is sort of the classic civil rights question, right. So if Walmart has, Walmart says we don't deny women promotions, right, because they're women, they actually just didn't do as well in their interviews. And they have interview notes, right. That is a routine expert analysis to examine the files, right, and to see whether the notes actually add up to a neutral examination what they're saying.

What we have here are essays. We have recommendations. We have review notes. We have all the key underlying material that leads to the question of what is going on here.

Now, if Harvard wants to, and we don't want this, if Harvard wants to say we'll give you the numbers and we'll rise or fall with the numbers, again, we oppose, we think that's not the appropriate way for the Court to build the kind of record that ultimately the Appellate Courts are going to ask me and Mr. Waxman at a podium about. And we won't have answers if we don't have the materials.

THE COURT: I am not suggesting you're not going to get some or all of the applications. I am wondering if there is some place we can start, in light of the interveners and *Fisher II* --

MR. CONSOVOY: Sure.

THE COURT: -- where we can get, start getting to the heart of what you are looking for. I am not suggesting you are not going to get the applications.

MR. CONSOVOY: Oh, right.

THE COURT: I would hate to have you up in front of that podium being embarrassed that I have created a --

(Laughter.)

MR. CONSOVOY: And so, you know, ultimately, I

think, in response to our motion we would like to hear from Harvard. Harvard said to the Court please don't make us give over all of the files. We'll give a statistically significant sample. We went back to our expert and said, okay, that is a somewhat reasonable request. Can you work with that, right? And the expert said yes, we can.

Let us tell you, given the volume of applications, it's not our fault that Harvard gets 37,000 applications a year. The experts have to tell us from an, I won't say "scientific" but, you know, from a matter of expertise how many they need to draw reliable statistical conclusions from that. And this is what they're telling us.

Now, if Harvard had an expert who can say that experts can draw reliable statistical conclusions about a 37,000-person process based on non-randomly selected, not stratified by race, 160 files, I would like to hear from that expert and then I think we could have a realistic conversation about their position and our position.

Right now their position is, well, we said statistically significant but we meant representative but not really representative because we want to cherrypick half of them so really what we're saying is you get nothing.

THE COURT: Okay. So let's do this -- Mr. Waxman, do you want to say something?

MR. WAXMAN: I mean, since -- I think I've

listened quite long enough to opposing counsel's characterizations of what I had said and what we've done.

They have filed a Motion to Compel attaching an expert's declaration in due course, on time, as we have filed -- as we have responded to every single discovery request in this case, we will respond with our own explanation for what we think is or isn't appropriate in the event that this type of discovery is permitted to go forward.

I do want to say that this very discussion, which is a small, small, small subset of the kinds of disputes that will come up if and when discovery does go forward full steam just underscores how important -- how pointless it is to have the discussion about what is or isn't relevant or what may or may not be necessary, either for them to discover or for us to produce in order to prove our case under whatever the standard is that the Supreme Court explicates until we have that standard but Your Honor was, I thought, clear that we weren't going to have an argument on the Motion to Compel since our time to respond hasn't occurred yet and we haven't responded.

And I just want to hesitate to say, if Your Honor wants to hear argument about this, you know, whether 6400 is right or what is representative or what our database, if and when discovery proceeds, will show in advance of us filing

our response, I can do it.

THE COURT: No, I am not going to put you in that position. That is not fair. That is not what I want to do today.

All right. So the Motion to Compel we'll keep under, we will hold aside until Harvard has an opportunity to respond. I think it is an important motion, we are going to take our time with it and look at it thoroughly.

That being said, if you have other motions on the protective order and things that can be resolved quickly, shoot them over and we will do it, okay. I don't want this hung up on those sorts of motions. This one is more substantive. We are going to take some time with it. But, you know, the protective orders, just shoot them over and if there is -- I don't have any reason to believe that they are withholding information inappropriately; but if they are, we will deal with it quickly. It is not going to be that public information is going to be held aside under a confidentiality order or a protective order.

In terms of the Motion to Stay, we will review it on the merits and rule on it in due course. If anyone -- I won't do anything with it for the next week and if anybody wants to take that week to sort of file something jointly or separately and that document will be something to the effect of if you are inclined to grant the partial stay, this is

what we propose. I will not take it to mean that anyone is actually agreeing to a partial stay but if you could give me some broad outlines and, again, unencumbered by too much thought (ph.), my proclivity is if we can find things that we can go forward on without, sort of under the *Fisher* cloud and the intervenor's cloud without prejudicing anybody too much and keeping the case moving, that is what I am philosophically interested in doing.

Now, I may read your briefs and they may completely change my mind; but in the interim if you want to submit something that says if there is going to be a partial stay, this is what we would like or we can live with or however you want to phrase it, why don't you take a week to do that and I won't rule on the motion on that.

Now, we did set another status three months out for, I am actually sort of, I mean -- so if the case is stayed, we won't need to meet. And if we are to a point where a ruling on the Motion to Compel, I assume you are going to need another hearing on that so why don't we not set another hearing for three months forward on the assumption that we will be here in the interim on one of these motions anyway. Okay? Is that all right with everyone?

MR. CONSOVOY: Yes, Your Honor.

MR. WAXMAN: Yes, Your Honor.

THE COURT: Anything else I can help you with today or is that it?

Okay. The case is recessed then. Thank you.

THE CLERK: All rise. Court is adjourned.

(WHEREUPON, the proceedings were recessed at 2:45 p.m.)

C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

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DATE: July 30, 2015